

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment delivered on: 05.09.2007

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IA No. 1980/2007 in TR. P. 15/2006

**EXECUTIVE ENGINEER IRRIGATION &
FLOOD CONTROL DEPARTMENT**

...Plaintiff

- versus -

M/S. SHREE RAM CONSTRUCTION CO. & ANR.

...Defendants

Advocates who appeared in this case:

For the Plaintiff	: Mr Rakesh Tiku
Defendants	: Mr G. K. Sharma

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

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| 1. Whether Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to the Reporter or not? | Yes |
| 3. Whether the judgment should be reported in Digest? | Yes |

BADAR DURREZ AHMED, J (ORAL)

1. This is an application filed on behalf of the respondent No.1 seeking dismissal of the Transfer Petition No. 15/2006 on two counts. It is firstly contended that the petition has been wrongly styled as a Transfer Petition and should have been numbered as an Original Miscellaneous Petition (OMP) inasmuch as it has been filed under Section 34 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the "said Act") challenging the Award dated 10.11.2004 made by Mr T. S. Bhatija, sole arbitrator. It has been contended on behalf of the respondent No.1 that while the Registry of

this Court was of the view that the petition cannot be numbered as a Transfer Petition, the petitioner insisted that the same should be numbered as such. According to the respondent No.1 the object of this was to get over the question of limitation. This leads to the second ground taken by the respondent No.1 and that is that the petition is, on the statements as made in the petition itself, barred by limitation.

2. At this stage it may be pointed out that the question of nomenclature of the petition is not really relevant as that can be easily corrected. The main issue is whether the petition, which is admittedly one under Section 34 of the said Act challenging the Award dated 10.11.2004, is within time or not? The brief facts are that the petitioner and the respondent No.1 (M/s. Shree Ram Construction Co.) entered into an agreement on 31.05.1999 for the construction of a single lane RCC bridge at RD-160M, across the supplementary drain. The contract value was of Rs 2,96,943/-. The agreement contained an arbitration clause. Disputes and differences had arisen between the parties. Since no arbitrator was being appointed, an arbitration application No. 229/2002 was filed before this Court by the respondent No.1 under Section 11 (6) of the said Act seeking appointment of an independent and impartial sole arbitrator. By an order dated 22.09.2003 the respondent No.2 was appointed as the sole arbitrator. The claims submitted by the respondent No.1 exceeded Rs 50 lacs, which according to the respondent

No.1, fell within the pecuniary jurisdiction of this Court. The sole arbitrator proceeded with the arbitration and made and published his Award on 10.11.2004. The sole arbitrator awarded a sum of Rs 5,37,160/- in favour of the respondent No.1 and against the petitioner together with interest at the rate of 10% per annum till full and final payment by the petitioner to the respondent No.1. The petitioner received the Award on 17.11.2004. Since the petitioner was aggrieved by the said Award, on 25.01.2005 the petitioner filed a petition under Section 34 of the said Act challenging the said Award. However, the petitioner, instead of filing that petition before this Court, filed it before the District Court, Delhi (numbered as suit No.19/2005). Objections were raised by the respondent No.1 with regard to the jurisdiction of the District Court. On 14.08.2006 a statement was made by Mr Sanjay Dewan, the Advocate for the petitioner, before the learned Additional District Judge, Delhi in the said suit No.19/2005. The statement was to the effect that he had instructions to state that the petitioner had no objection for allowing the application of the respondent under Section 42 of the said Act for return of the present objection under Section 34 of the said Act for refiling in the High Court of Delhi which is the competent court of jurisdiction as the arbitrator in the present case was appointed by an order of the High Court of Delhi in petition No. 229/2002 vide order dated 22.09.2003. On the basis of this statement, the learned Additional District Judge passed the following order on 14.08.2006 itself:-

“Statement of Sh. Sanjay Dewan, Advocate for petitioner recorded by which petitioner wants to withdraw the present petition for filing the same in the Hon'ble High Court of Delhi.

The prayer of the petitioner is allowed. The petition be returned to the petitioner along with documents for presentation to the Hon'ble High Court of Delhi.

Accordingly petition of the petitioner disposed as withdrawn.

Other papers be consigned to Record Room.”

3. It is stated that the original papers were returned to the petitioner on 25.08.2006. The present petition has been filed on 10.10.2006. It has been contended on behalf of the respondent No.1 that the present petition is beyond time as prescribed under Section 34 (3) of the said Act. The said provision reads as under:-

“34. Application for setting aside arbitral award.

(1) xxxxxx

(2) xxxxxx

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the arbitral award or, if a request had been made under section 33, from the date on which that request had been disposed of by the arbitral Tribunal:

Provided that if the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months it may entertain the application within a further period of thirty days, but not thereafter.

(4) xxxxxx”

On the other hand, the learned counsel for the petitioner contended that the present petition is not barred by limitation. He submitted that the Award was received by the petitioner on 17.11.2004 and, therefore, in terms of Section 34 (3) of the said Act the clock would start running from then, i.e, the date on which the arbitral Award is received by the petitioner. He further contended that on 25.01.2005 the petition was initially filed before the District Court which turned out to be a forum which did not have jurisdiction. He submitted that in view of Section 14 of the Limitation Act, 1963, the entire period commencing from 25.01.2005 and ending with 25.08.2006 (when the original papers were returned) would have to be excluded in computing the period of limitation. It is an admitted position that the period commencing on 25.01.2005 and ending on 25.08.2006 is a period of one year and seven months. It is also admitted by the parties that the period commencing on 17.11.2004 (the date on which the petitioner received the Award) and ending on 10.10.2006 (the date on which the present petition was filed) is a period of one year ten months and twenty three days. It was, therefore, contended by the learned counsel for the respondent No.1 that even if it is assumed that Section 14 of the Limitation Act, 1963 would be attracted in this case and the period of one year and seven months, which was spent in the District Court, Delhi is excluded, then the petition has been filed after three months and twenty three days of the receipt of the Award by the petitioner. The period prescribed

under Section 34 (3) is only three months in the first instance. The proviso to Section 34 (3) extends that period by a further period of 30 days provided the Court is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of three months. In this context it was submitted that, first of all, the petitioner cannot take the double benefit of both Section 14 of the Limitation Act, 1963 as well as the proviso to Section 34 (3) of the said Act. Secondly, it was submitted that the petitioner, in any event, cannot invoke the proviso to Section 34 (3) of the said Act inasmuch as no application has been filed for condonation of delay on the part of the petitioner and no circumstances had been given as to in what manner the petitioner was prevented by sufficient cause from making the application within the prescribed period of three months. It was also contended on behalf of the respondent No.1 that Section 14 of the Limitation Act, 1963 does not get automatically attracted when a proceeding is filed in a Court without jurisdiction. There are two conditions which have to be satisfied before the provisions of Section 14 get attracted. The first condition being that the plaintiff must show that he had been prosecuting the proceeding with due diligence and secondly that the same was being prosecuted in good faith in a court which, from defect of jurisdiction, was unable to entertain it. The learned counsel for the respondent No.1 place reliance on the following decisions:-

1. *Ramdhari Lal and Ors. v Uday Narayan and Ors:*
AIR 1957 Patna 324
2. *Sinna Karuppan & Ors. v Muthiah Chettiar & Ors. :*
AIR 1926 Madras 178
3. *Maqbul Ahmad v Onkar Pratap:* *AIR 1935 Privy Council 85*
4. *Amar Chand v Union of India:* *AIR 1973 SC 313*
5. *Union of India v Mahavir Industries:* *IA No.1888/2006 and OMP No.300/2002 decided on 14.09.2006*
6. *Anas Abdul Khader v Abdul Nasar:* *2001 (2) RAJ 124 (Ker)*
7. *Union of India v. M/s. Popular Construction Co.:*
AIR 2001 SC 4010
8. *National Projects Constructions Corporation Ltd v Bundela Bandhu Construction Company:**2007 (3) RAJ 306 (DEL) (DB)*
9. *The Hatti Gold Mines Limited v Vinay Heavy Equipments:* *2005(2) RAJ 324 (Kar) (DB)*

All these decisions need not be referred to as some of them are not apposite to the facts and circumstances of the present case. However, I shall refer to the relevant decisions in the course of the discussion below.

4. Reading Section 34 (3) of the said Act it is abundantly clear that the application for setting aside an Award can be made, in the first instance, only within three months from the date on which the arbitral Award is received by the party making that application. If that provision alone is to be

considered then clearly the present application is beyond time. The Award was received by the petitioner on 17.11.2004. The present petition has been filed on 10.10.2006, that is, one year ten months and twenty three days later. Simply going by these dates, the present petition is barred by time. It has been clearly stipulated in the proviso to Section 34 (3) that a further thirty days extension can be granted for the filing of an application for setting aside an Award “but not thereafter”. The Supreme Court in the case of ***Popular Construction (supra)*** had categorically held that the time limit prescribed under Section 34 (3) is absolute and unextendable by Court beyond what is provided therein. Therefore, the absolute maximum that has been prescribed is three months plus thirty days and nothing more. Going simply by dates mentioned above, that is, the date of receipt of the arbitral Award and the date of filing of the petition, this period of three months and thirty days is clearly exhausted. Therefore, the petition would be barred by time.

5. But, the learned counsel for the petitioner had sought the invocation of the provisions of Section 14 of the Limitation Act, 1963 for excluding the time spent in the District Court which would, as indicated above, come to exactly one year and seven months. If that period is excluded then the petition would be deemed to have been filed within three months and twenty three days of the receipt of the arbitral Award by the petitioner. Therefore, the petitioner would have to invoke the provisions of the proviso to Section 34 (3)

of the said Act. As pointed out above the proviso permits the Court to extend the period of three months by a further thirty days. But this can only be done if the Court is satisfied that the applicant was prevented by sufficient cause by making the application within the said period of three months. There are two difficulties which come in the way of the petitioner. First of all, the petitioner has not filed any application for condonation of delay and/ or for invoking the proviso to Section 34 (3) of the said Act. This in itself would be sufficient to reject the present petition as being time barred in view of the decision of a learned Single Judge of this Court in the case of ***Union of India v Mahavir Industries*** (*supra*). The petitioner has even otherwise not disclosed any cause as to why the petitioner should be given the benefit of the proviso. This takes me to the second difficulty which faces the petitioner and that difficulty is that the District Court had returned all the papers to the petitioner on 25.08.2006 but, the petitioner waited another 45 days before it filed the present petition on 10.10.2006. There is no explanation for this delay. Therefore, the question of the petitioner invoking the proviso to Section 34 (3) does not arise at all. It may be pointed out that in ***National Projects Construction Corporation*** (*supra*), a Division Bench of this Court had observed that Court should not overlook the fact that parliament had made no distinction between the government and private persons so far as law of limitation is concerned. The Division Bench also observed that experience has shown that latitude given by the courts has only come to be misused; “delay of some days of yore, has been

replaced by delay of months and years.” Therefore, even the fact that the petitioner is a government agency will not be of any avail to the petitioner.

The said decision also arrived at two conclusions:-

“Firstly, that the Court does not possess any power to condone delay after the lapse of thirty days from the expiry of three months from date of delivery of copy of the Award on the parties.”

XXXXXXXXXXXX.

“Secondly, we hold that Section 32(5)* of the A & C Act must be strictly complied with and the Award must actually be served on the officer concerned by the Arbitrator.”

In that case a question with regard to the delivery of the Award has arisen. However, in the present case the controversy does not arise as it is an admitted position that the arbitral Award was received by the petitioner on 17.11.2004.

6. This discussion would be sufficient to hold that the petition is barred by time inasmuch as even if the benefit of Section 14 of the Limitation Act is given to the petitioner he would still have to invoke the proviso to Section 34 (3) of the said Act. The fact that the petitioner has been unable to show any cause, what to speak of sufficient cause, for not filing the petition within the period prescribed, clearly leads to the conclusion that the proviso cannot be attracted in this case. This Court is not satisfied that the petitioner was prevented by sufficient cause from making the application within the said period of three months. However, since arguments had been addressed on the

* (Sic) should be Section 31 (5)

question of Section 14 of the Limitation Act, 1963, it would be in the completeness of things to discuss the same. Section 14 of the Limitation Act, 1963 reads as under:-

“14. Exclusion of time of proceeding *bona fide* in court without jurisdiction

(1) In computing the period of limitation for any suit the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the defendant shall be excluded, where the proceeding relates to the same matter in issue and is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(2) In computing the period of limitation for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding, whether in a court of first instance or of appeal or revision, against the same party for the same relief shall be excluded, where such proceeding is prosecuted in good faith in a court which, from defect of jurisdiction or other cause of a like nature, is unable to entertain it.

(3) Notwithstanding anything contained in rule 2 of Order XXIII of the Code of Civil Procedure, 1908 (5 of 1908), the provisions of sub-section (1) shall apply in relation to a fresh suit instituted on permission granted by the court under rule 1 of that Order, where such permission is granted on the ground that the first suit must fail by reason of a defect in the jurisdiction of the court or other cause of a like nature.

Explanation: For the purposes of this section-

- (a) in excluding the time during which a former civil proceeding was pending, the day on which that proceeding was instituted and the day on which it ended shall both be counted;
- (b) a plaintiff or an applicant resisting an appeal shall be deemed to be prosecuting a proceeding;

(c) misjoinder of parties or of causes of action shall be deemed to be a cause of a like nature with defect of jurisdiction.”

Sub-Section (1) of Section 14 of the Limitation Act, 1963 clearly provides that two conditions must be fulfilled before the benefit of exclusion of time can be granted. The two conditions being that the plaintiff has been prosecuting the case with due diligence and that the same has been prosecuted in good faith. In this context it must be seen that Section 34 of the said Act clearly provides that an arbitral Award may be set aside upon an application before a Court. The word “Court” has been defined in Section 2 (e) of the said Act. It reads as under:-

“2. **Definitions.**— (1) In this Part, unless the context otherwise requires,—

XXXX XXXX XXXX XXXX

(e) "court" means the principal civil court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal civil court, or any Court of Small Causes;

XXXX XXXX XXXX XXXX”

Reading the definition of “court”, it becomes very clear that the court in which the petition under Section 34 can be filed, would be the court which would have had jurisdiction in respect of the subject matter of the arbitration if the same had been the subject matter of a suit. This means that if there had

been no arbitration clause and the parties had to file a suit then the court in which the suit could be filed would be the court before which the Section 34 application could be filed. The claim filed by the respondent was in excess of Rs 50 lacs. Clearly, if a suit were to be filed in respect of that subject matter then the District Courts in Delhi would not have pecuniary jurisdiction and it would only be this Court in its ordinary original civil jurisdiction, which would have had the jurisdiction to entertain the suit. Therefore, it is this Court alone before which the petition under Section 34 of the said Act could have been filed.

7. The petitioner cannot be said to have been ignorant of these provisions and as observed by a Division Bench of the Karnataka High Court in the case of **Hatti Gold Mines Limited** (*supra*) when the parties knew and were aware of the provisions with regard to jurisdiction, if a case is then filed in a court not having jurisdiction, it would have to be concluded that the matter was not being prosecuted in good faith nor was it being prosecuted with due diligence. In **Hatti Gold Mines Limited** (*supra*) the parties had agreed that the Courts at Bangalore would have jurisdiction. Part of the cause of action also arose in Bangalore. Yet, one of the parties filed the case in Chitradurga and that too not before the principal court. The Karnataka High Court came to the conclusion, on these facts, that the case filed at Chitradurga was not in good faith and, therefore, the provisions of Section 14 of the Limitation Act, 1963

could not be invoked. With regard to the question of due diligence, the Division Bench of Karnataka High Court also noted that the party which approached the Court not having jurisdiction had ample access to legal opinion and despite the availability of such opinion went ahead and filed the case in Chitradurga. When that Court returned the plaint, the party still went ahead and filed it in the District Court in Chitradurga and not in Bangalore. In this context the Karnataka High Court observed that both the conditions of due diligence and good faith had not been satisfied and, therefore, Section 14 of the Limitation Act, 1963 would not be attracted and the party could not get the benefit of exclusion of time in respect of the proceeding in the Courts at Chitradurga. A somewhat similar situation had arisen in the present case. The petitioner was well aware that the limit of pecuniary jurisdiction of the District Court did not permit it to entertain a petition where the initial claim was in excess of Rs 50 lacs. The petitioner was also well aware that the arbitrator in the present case had been appointed in a petition filed before this Court under Section 11(6) of the said Act. Consequently, it cannot be said that the petitioner was not aware of the fact that the District Courts at Delhi were not the proper courts and that the Section 34 petition ought to have been filed before this Court in the first instance.

8. Therefore, I am of the view that the petition was not filed in good faith before the District Court, Delhi. With regard to diligence, it must be

noted that even after the original papers were returned on 25.08.2006 the petitioner waited another 45 days and filed the present petition only on 10.10.2006. Assuming that the period of one year and seven months could be excluded, the petitioner had another 22 days under the original period of three months for filing the petition before this Court. Yet, despite knowing that there was great urgency in the matter, the petitioner exhausted the 22 days available to it under the initial three-month period under Section 34 (3). Therefore, under no stretch of imagination can the petitioner be regarded as having made out a case for either exclusion of time under Section 14 of the Limitation Act, 1963 or for invoking the proviso to Section 34 (3) of the said Act. Consequently, the respondent No.1's application for dismissal of the petition as being time barred is liable to be allowed.

This application is allowed. The petition and all other pending applications are dismissed.

**BADAR DURREZ AHMED
(JUDGE)**

September 05, 2007
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